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No. 35316-8-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Bryan Crow,

Appellant.

Yakima County Superior Court Cause No. 15-1-00881-7

The Honorable Judge Richard H. Bartheld

Appellant's Opening Brief

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ISSUES AND ASSIGNMENTS OF ERROR..... 1

STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 3

ARGUMENT..... 5

I. Police testimony invaded the province of the jury and deprived Mr. Crow of his Sixth and Fourteenth Amendment right to a jury trial. 5

A. The Court of Appeals should review *de novo* this manifest constitutional error. 5

B. The prosecutor improperly relied on profile evidence amounting to a “nearly explicit” opinion that Mr. Crow knew the firearm he possessed was stolen. 6

C. If the constitutional error is not manifest, Mr. Crow’s attorney provided ineffective assistance by failing to object. 9

II. The trial court erred by finding that Mr. Crow had an offender score of four..... 12

CONCLUSION 13

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	9
--	---

WASHINGTON STATE CASES

<i>Blomstrom v. Tripp</i> , 189 Wn.2d 379, 402 P.3d 831 (2017).....	5
<i>State v. A.N.J.</i> , 168 Wn.2d 91, 225 P.3d 956 (2010)	10
<i>State v. Bahl</i> , 164 Wn.2d 739, 193 P.3d 678 (2008).....	12
<i>State v. Braham</i> , 67 Wn. App. 930, 841 P.2d 785 (1992)	7, 9, 10, 11
<i>State v. Hunley</i> , 175 Wn.2d 901, 287 P.3d 584 (2012).....	12
<i>State v. King</i> , 167 Wn.2d 324, 219 P.3d 642 (2009)	6, 8, 9
<i>State v. Kirkman</i> , 159 Wn.2d 918, 155 P.3d 125 (2007)	7
<i>State v. Kitchen</i> , 110 Wn.2d 403, 756 P.2d 105 (1988).....	7
<i>State v. Kyllo</i> , 166 Wn.2d 856, 215 P.3d 177 (2009)	10, 11
<i>State v. Lamar</i> , 180 Wn.2d 576, 327 P.3d 46 (2014)	6
<i>State v. Maule</i> , 35 Wn. App. 287, 667 P.2d 96 (1983).....	7
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	10
<i>State v. O'Hara</i> , 167 Wn.2d 91, 217 P.3d 756 (2009), as corrected (Jan. 21, 2010)	6
<i>State v. Petrich</i> , 101 Wn.2d 566, 683 P.2d 173 (1984)	7
<i>State v. Price</i> , 126 Wn. App. 617, 109 P.3d 27 (2005).....	8
<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004)	10

<i>State v. Saunders</i> , 91 Wn. App. 575, 958 P.2d 364 (1998)	10, 11
<i>State v. Steward</i> , 34 Wn. App. 221, 660 P.2d 278 (1983)	7
<i>State v. Tewee</i> , 176 Wn. App. 964, 309 P.3d 791 (2013)	12

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. VI	1, 5, 6, 9, 11
U.S. Const. Amend. XIV	1, 5, 6, 9, 11
Wash. const. art. I, § 21	6
Wash. const. art. I, § 22	6

WASHINGTON STATE STATUTES

RCW 9.94A.525	12
RCW 9A.56.140	7
RCW 9A.56.310	7

OTHER AUTHORITIES

ER 401	10
ER 402	10
ER 403	10
ER 702	9
RAP 2.5	5, 6, 10

ISSUES AND ASSIGNMENTS OF ERROR

1. Mr. Crow's conviction for possession of a stolen firearm was entered in violation of his Sixth and Fourteenth Amendment right to a jury trial.
2. Three police officers provided testimony that invaded the province of the jury and infringed Mr. Crow's right to an independent determination of the facts.
3. Three officers provided improper profile testimony implying that Mr. Crow was guilty based on the characteristics of known offenders.
4. Each officer improperly provided a nearly explicit opinion on Mr. Crow's guilt.

ISSUE 1: Opinion testimony on the guilt of an accused person infringes the right to an independent jury determination of the facts. Was Mr. Crow's conviction for possession of a stolen firearm obtained in violation of his Sixth and Fourteenth Amendment right to a jury trial, because it was based in part on profile testimony amounting to a nearly explicit opinion on guilt?

5. Mr. Crow was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
6. Mr. Crow's attorney provided ineffective assistance of counsel by failing to object to inadmissible profile testimony.

ISSUE 2: Defense counsel provides ineffective assistance by failing to object to inadmissible evidence absent a valid tactical reason. Was Mr. Crow denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel by his attorney's failure to object to inadmissible profile testimony that amounted to a nearly explicit opinion on guilt?

7. The trial court failed to properly determine Mr. Crow's criminal history, offender score, and standard range.
8. The trial court erred by including in Mr. Crow's criminal history offenses that were not admitted, acknowledged, or proved.
9. The trial court erred by sentencing Mr. Crow with an offender score of four.

10. The trial court erred by adopting Finding of Fact No. 2.3.

11. The trial court erred by adopting Finding of Fact No. 2.5.

ISSUE 3: At sentencing, the State bears the burden of proving prior convictions. Did the court err by sentencing Mr. Crow with an offender score of four absent an acknowledgment or any evidence regarding two felonies alleged to be part of his criminal history?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

At Bryan Crow's trial for possession of a stolen firearm,¹ the primary issue was whether he knew the gun he'd possessed was stolen. CP 2; RP 288-310. The jury's only question during deliberations involved this issue of Mr. Crow's knowledge. CP 173; RP 318-320.

To prove Mr. Crow's state of mind, the prosecution introduced police testimony outlining general patterns regarding felons and stolen firearms. Mr. Crow's attorney did not object to any of this testimony.

Officer Chris Taylor outlined actions "indicative of somebody knowing something is stolen property," based on his training and experience. RP 201-202. The prosecutor prompted Taylor to say that "discarding and flight are pretty common" indicators of such knowledge. RP 202.

Taylor also testified, based on his training and experience, that most arrests for unlawful firearm possession involved stolen guns. RP 203.

Detective Gonzolo Deloza echoed this opinion, testifying that, based on his training and experience, "most of the people that I know that

¹ Although Mr. Crow was also charged with unlawful possession of a firearm, he stipulated to his prior conviction and did little at trial to contest possession of an operable firearm. CP 2; RP 81-326.

are prohibited from having firearms obviously they're not allowed to have them so they had to get them somewhere else and most of them are stolen." RP 239-240.

Officer Booker Ward testified that, based on his training and experience, "a high percentage" of stolen firearms turn up in the hands of those prohibited from possessing guns. RP 220.

Relying on this testimony in closing, the prosecutor asked jurors to infer that Mr. Crow had actual knowledge that the gun was stolen. RP 292-296, 299-303, 307-310.

During deliberations, jurors sent out a note:

We believe a reasonable person would assume the firearm is stolen. Are we allowed to say the defendant would believe the same and would that count as knowledge?
CP 173.

The court referred the jury back to the instructions, and jurors convicted Mr. Crow as charged. CP 173-175; RP 318-324.

At sentencing, the State alleged that Mr. Crow had three prior adult felonies and one prior juvenile felony. Mr. Crow had stipulated to one prior felony conviction (to support the UPF charge). CP 111, 165; RP 28-

30.² However, he did not admit to any of the other prior felonies, and the State offered no proof of their existence. RP 337-349.

The court sentenced Mr. Crow with an offender score of four and imposed a 77-month prison sentence. CP 177-178; RP 342. Mr. Crow appealed. CP 189.

ARGUMENT

I. POLICE TESTIMONY INVADED THE PROVINCE OF THE JURY AND DEPRIVED MR. CROW OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO A JURY TRIAL.

The State used profile evidence to suggest Mr. Crow had actual knowledge that the firearm was stolen. This violated Mr. Crow's right to a jury determination of the facts necessary conviction. The Court of Appeals should reverse his conviction for possession of a stolen firearm.

A. The Court of Appeals should review *de novo* this manifest constitutional error.

Alleged constitutional errors are reviewed *de novo*. *Blomstrom v. Tripp*, 189 Wn.2d 379, 389, 402 P.3d 831 (2017). A manifest error affecting a constitutional right may be raised for the first time on appeal. RAP 2.5(a)(3).

² He also stipulated to a conviction for misdemeanor theft for impeachment purposes. RP 31-34.

To raise a manifest error, an appellant need only make “a plausible showing that the error... had practical and identifiable consequences in the trial.” *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014).³ An error has practical and identifiable consequences if “given what the trial court knew at that time, the court could have corrected the error.” *State v. O’Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2009), as corrected (Jan. 21, 2010).

Here, the prosecutor introduced improper profile evidence that invaded the province of the jury, and then sought conviction based on that evidence. RP 202-203, 220, 239-240, 292-296, 299, 303, 307-310. Given what the trial judge knew at the time, he could have corrected the error. *Id.* The error is manifest and may be raised for the first time on appeal. RAP 2.5(a)(3); *State v. King*, 167 Wn.2d 324, 331-332, 219 P.3d 642 (2009).

B. The prosecutor improperly relied on profile evidence amounting to a “nearly explicit” opinion that Mr. Crow knew the firearm he possessed was stolen.

Testimony providing an improper opinion of guilt invades the constitutional right to a jury trial. *Id.*; U.S. Const. Amend. VI, XIV; Wash. const. art. I, §§ 21, 22. Neither a lay nor an expert witness may offer improper opinion testimony by direct statement or inference. *Id.*

³ The showing required under RAP 2.5 (a)(3) “should not be confused with the requirements for establishing an actual violation of a constitutional right.” *Id.*

Testimony is improper if it amounts to a nearly explicit opinion on the defendant's guilt. *Id.*, at 333. A police officer's improper opinion may be particularly prejudicial because it carries "a special aura of reliability." *Id.* (quoting *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007)).

An expert opinion in the form of "profile" testimony creates the risk of "unfair prejudice and the ensuing false impression the jury might derive about the value of the expert's ostensible inference." *State v. Braham*, 67 Wn. App. 930, 935, 841 P.2d 785 (1992).⁴ Such evidence has "virtually no probative value" and is unduly prejudicial because it implies a specific person's guilt based on characteristics of known offenders. *Id.*, at 939.

To obtain a conviction for possession of a stolen firearm, the State was required to prove that Mr. Crow knew the gun was stolen. RCW 9A.56.140; RCW 9A.56.310; CP 169. The prosecutor could have introduced testimony about Mr. Crow's actions and argued appropriate inferences from those actions in closing.

⁴ See also *State v. Maule*, 35 Wn. App. 287, 293, 667 P.2d 96 (1983); *State v. Steward*, 34 Wn. App. 221, 223, 660 P.2d 278 (1983); *State v. Petrich*, 101 Wn.2d 566, 576, 683 P.2d 173, 180 (1984), modified in part on other grounds by *State v. Kitchen*, 110 Wn.2d 403, 756 P.2d 105 (1988).

Thus, for example, it would have been proper to suggest that Mr. Crow's flight showed consciousness of guilt, and that he discarded the gun (at least in part) because he knew it was stolen. *See, e.g., State v. Price*, 126 Wn. App. 617, 645, 109 P.3d 27 (2005) (discussing flight as evidence of guilt).

Instead of staying within permissible limits, the prosecutor elicited improper profile testimony, which he then relied on heavily in closing argument. RP 202-203, 220, 239-240, 292-296, 299, 303, 307-310. This invaded Mr. Crow's constitutional right to have the jury determine the facts necessary for conviction. *King*, 167 Wn.2d at 331-332.

Three officers provided general testimony about felons and stolen guns, based on their "training and experience." RP 201-203, 220, 239-240. Taylor told jurors that Mr. Crow's behaviors were, in his training and experience, "pretty common" indicators of a suspect's knowledge that an item is stolen. RP 201-202. Taylor and Deloza each testified, based on their training and experience, that most instances of unlawful possession involve stolen firearms. RP 203, 239-240. Ward testified that, based on his training and experience, a "high percentage" of stolen firearms turn up in the hands of felons and other prohibited persons. RP 220.

The purpose of the testimony was to suggest that Mr. Crow knew the firearm was stolen because he fit within the profile described by each

officer. The focus on “training and experience” implied that the testimony derived from each officer’s expertise. *See* ER 702 (noting that a witness may be “qualified as an expert by knowledge, skill, experience, training, or education.”).

The improper profile testimony implied Mr. Crow’s guilt—his knowledge that the firearm was stolen—based on characteristics of others who may knowingly possess stolen firearms. *See Braham*, 67 Wn. App. at 939. It amounted to a “nearly explicit” opinion on guilt, given Mr. Crow’s failure to contest possession.

The testimony invaded the province of the jury and violated Mr. Crow’s Sixth and Fourteenth Amendment right to a jury trial. *King*, 167 Wn.2d at 331-332. His conviction for possession of a stolen firearm must be reversed and the charge remanded for a new trial. *Id.*

C. If the constitutional error is not manifest, Mr. Crow’s attorney provided ineffective assistance by failing to object.

The right to counsel includes the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To obtain relief on an ineffective assistance claim, a defendant must show “that (1) his counsel’s performance fell below an objective standard of reasonableness and, if so, (2) that counsel’s poor work prejudiced him.” *State v. A.N.J.*,

168 Wn.2d 91, 109, 225 P.3d 956 (2010); *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Although courts apply “a strong presumption that defense counsel’s conduct is not deficient,” a defendant rebuts that presumption if “no conceivable legitimate tactic explain[s] counsel’s performance.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).⁵

Counsel performs deficiently by failing to object to inadmissible evidence absent a valid strategic reason. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998) (citing *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995)). Reversal is required if an objection would likely have been sustained and the result of the trial would have been different without the inadmissible evidence. *Id.*

Profile testimony is inadmissible under ER 401, ER 402, and ER 403. *Braham*, 67 Wn. App. at 937-939. It has “virtually no probative value” and is “unduly prejudicial.” *Id.* at 939. Here, the prosecutor relied on profile testimony to imply Mr. Crow’s guilt, based on the characteristics of known offenders. This was improper. *Id.*

A reasonable defense attorney would have objected. *Id.* Mr. Crow’s lawyer provided deficient performance by failing to protect his

⁵ Ineffective assistance is an issue of constitutional magnitude that the court can consider for the first time on appeal. *Kyllo*, 166 Wn.2d at 862; RAP 2.5 (a)(3).

client from the irrelevant, highly-prejudicial evidence. *Saunders*, 91 Wn. App. at 578.

There was no valid tactical reason underlying defense counsel's failure to object to the inadmissible profile testimony. *Id.* The evidence directly undermined the defense theory (that the State could not prove knowledge).

The improper admission of profile testimony prejudices the accused when the State relies on it in closing argument. *See Braham*, 67 Wn. App. At 939-940. Here, the prosecutor relied on the improper profile testimony in closing. RP 292-296, 299-303, 307-310.

Furthermore, there was no direct proof of knowledge, and Mr. Crow had reasons to flee and discard the gun even if he believed it wasn't stolen. Thus, there is a reasonable probability that defense counsel's failure to object affected the outcome of Mr. Crow's trial. *Kyllo*, 166 Wn.2d at 862.

Counsel's failure to object deprived Mr. Crow of his Sixth and Fourteenth Amendment right to the effective assistance of counsel. *Id.* Mr. Crow's conviction for possession of a stolen firearm must be reversed, and the charge remanded for a new trial. *Id.*

II. THE TRIAL COURT ERRED BY FINDING THAT MR. CROW HAD AN OFFENDER SCORE OF FOUR.

An offender score calculation is reviewed *de novo*. *State v. Tewee*, 176 Wn. App. 964, 967, 309 P.3d 791 (2013). An illegal or erroneous sentence may be challenged for the first time on review. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

The sentencing court is required to determine an offender score based on the number of adult and juvenile felony convictions existing before the date of sentencing. RCW 9.94A.525(1). In determining the offender score, due process permits the court to rely only on what has been “admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing.” *State v. Hunley*, 175 Wn.2d 901, 909, 287 P.3d 584 (2012). The burden is on the prosecution to establish the accused’s criminal history by a preponderance of the evidence. *Id.*

A prosecutor’s “bare assertions, unsupported by evidence do not satisfy the State’s burden to prove the existence of a prior conviction.” *Id.* at 910. This is true even when defense counsel does not object. *Id.* at 915.

Here, the court found three prior adult felonies and one prior juvenile felony. CP 177. Other than the assault to which Mr. Crow stipulated at trial (as the basis for the UPF charge), the State presented no

evidence proving that Mr. Crow had prior felony convictions. RP 337-349.

The record does not support the court's findings regarding Mr. Crow's criminal history, offender score, and standard range. The findings must be vacated, the sentence reversed, and the case remanded for a new sentencing hearing. *Id.*

CONCLUSION

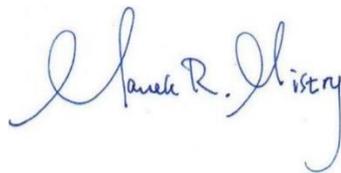
For the foregoing reasons, Mr. Crow's conviction for possession of a stolen firearm must be reversed and the case remanded for a new trial. In the alternative, his sentence must be vacated and the case remanded for a new sentencing hearing.

Respectfully submitted on January 29, 2018,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division III, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on January 29, 2018.



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